

THE PERFORMANCE OF THE EU IN THE INTERNATIONAL INSTITUTIONAL LANDSCAPE OF THE INTERNET

*George Christou (Department of Politics and International Studies, University of
Warwick, UK)*

Seamus Simpson (School of Media, Music and Performance, University of Salford, UK)

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ABSTRACT

The paper undertakes a review of the how the EU has ‘acted’ within the Internet governance space that exists and is still being developed at the international level. In the process, the paper assesses the utility of some of the main approaches taken thus far to explain the significance of the EU’s activities and concludes by suggesting future directions for the analysis of the EU as an actor in Internet governance, and, beyond this, international regimes and institutions more broadly.

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Contact:

George Christou: g.christou@warwick.ac.uk

Seamus Simpson: s.simpson@salford.ac.uk

INTRODUCTION

The Internet is a relatively new and growing aspect of international political-economic affairs. The last 10-15 years have witnessed the frequently controversial emergence and development of a new global(ising) institutional landscape for Internet governance. An actor keen on expanding its presence on the international political stage, the EU has shown itself keen to develop a prominent position in the international institutional landscape of the Internet. This short paper provides an outline of some of the main findings of a recent body of academic research conducted by the authors aimed at explaining the role and significance of the EU as an international actor in Internet governance.

Inevitably, the EU's ability to exert its preferences and influence on Internet governance has shown mixed results. Policy activity is most clearly evidenced in three contexts. The first context is a general one: as the Internet has increased in global political importance, the EU has made a number of general strategic statements outlining its position on the evolving landscape and, in the process, establishing itself as an important commentator on Internet policy matters. Whilst not exclusively for 'external' consumption, these statements set out key approaches - and actions informed by them - that the EU is likely to pursue in the short to medium term future. The second and third contexts are institution-specific. As the paper shows, the EU has engaged to a very significant degree with the Internet Corporation for Assigned Names and Numbers (ICANN), one of the earliest and arguably the most high profile global governance body for the Internet to have emerged to date. The EU's presence has also been noteworthy in the newer Internet Governance Forum (IGF), a multi-stakeholder deliberative body formed in 2005 and whose performance and potential continuation are currently under review.

The paper is structured as follows. The next section outlines a number of key concepts which have been utilised to provide a better understanding of the role of the EU in the evolving international institutional landscape of the Internet. Thereafter, brief treatment is given to a description and explanation of some of the most prominent Internet policy

activities with which the EU has engaged at the global level. Here focus is trained on three areas: early action taken by the EU to establish itself in an unfamiliar institutional and policy landscape; the degree to which the EU has been able to develop coherent policy positions on Internet governance; and the extent to which its involvement in the international institutional context of Internet governance has impacted on it 'domestically'. The final section of the paper draws together some of the main findings of the research conducted to date and suggests a number of areas around which a future research agenda might be formulated.

REVIEW OF THEORETICAL APPROACHES

Whilst there is a plethora of work on the role of the US in international regimes and institutions, this has not been the case until very recently for the EU (in terms of the quantity of work, anyway). There is even less work on the role of the EU in international Internet institutions; mainly because of the relative newness of the EU's activity in this area compared to more established regimes and institutions, although much work does exist on how the EU has shaped the different dimensions of the global and regional Information Society agenda, in particular telecommunications.

Our initial work on this topic (Christou and Simpson 2007a) utilised the regulatory state and governance literature in order to answer the question of what the EU was promoting in Internet governance at all levels, including that of the international realm. To this end it did not theorise or conceptualise the EU's role as such, but how its internal dynamic (and the external context) and identity impacted on the EU's Internet governance initiatives and more specific Directives (e-commerce) and Regulations (dot eu).

Subsequent work (Christou and Simpson 2007b; Christou and Simpson 2008; Christou and Simpson 2009; Christou and Simpson 2010a; Christou and Simpson 2010b) sought to add to 'what' the European Union is promoting normatively and develop 'how' and 'why' the EU has acted, and indeed how international institutions have impacted on the EU in its construction of Internet governance policy and execution of process. *Inter alia*,

this work drew extensively from the IR literature that has explored: strategic norm manipulation in international institutions (Schimmelfennig 2003) and the broader literature that has emerged which conceptualises EU actorness (Bretherton and Vogler 2006); the EU's role in international regimes (Smith and Elgström 2008) and international organisations (Jørgensen 2009); and the EU as a strategic actor in international politics (Smith and Xie 2009). It has also utilised frameworks that conceptualise how (i.e. resources, mechanisms and tools available) international organisations implement policies, rule or codes of conducts on regional bodies and nations states (Verbeek et al 2008); and indeed, literature that has sought to theorise how international organizations can shape EU norms, thus focusing on downloading rather than uploading (Costa and Jørgensen 2010).

Overall then, our work on Internet governance has sought to explain, understand and reflect on:

- The EU's promotion of governance in international Internet governance institutions, where the focus has been on drawing out and attempting to characterise the type of governance the EU has favoured. We have, in particular, sought to sketch out and provide a conceptual map that encapsulates different forms of public and private governance (see Table 1 below from Christou and Simpson 2009) in order to capture and uncover the nuance in what the EU has promoted over time, and indeed to ascertain if and how the EU's projections have changed over time, and in what direction.

Hierarchical ◀.....▶ *Non-hierarchical*

Regulatory state.....Post-Regulatory State

'Concerted action'	'Subcontracting'	'Market-based/state shadowed self-regulation'	'Voluntary Action'
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<p>Where the state sets both formal and substantive conditions for rule-making</p> <p>Governance: <u>Actor constellation:</u> Public interest networks/agencies Delegation of public functions to public actors <u>Polity:</u> Central authority: coercion/bargaining <u>Policy:</u> Legally binding instruments/legal framework, flexible/rigid implementation, procedural/material regulation, sanctions</p>	<p>Where state involvement is limited to setting formal conditions for rule-making with private actors then shaping the content.</p> <p>Governance: <u>Actor constellation:</u> Public-private networks Delegation of public functions to private actors <u>Polity:</u> Central/Dispersed loci of authority: bargaining, learning <u>Policy:</u> Legal framework, flexible/rigid implementation, procedural/material regulation, incentives/sanctions</p>	<p>Involves industry-setting, monitoring and enforcing standards in the knowledge that if it fails, state intervention could be imminent, that is, self-regulation in the shadow of the state</p> <p>Governance: <u>Actor constellation:</u> Public-private networks/communities/associations <u>Polity:</u> Dispersed loci of authority: Persuasion, learning, arguing, <u>Policy:</u> Soft law, flexible implementation, procedural regulation, incentives</p>	<p>Self-regulation can occur in a purely voluntary way with no direct state stimulus or intervention.</p> <p>Governance: <u>Actor constellation:</u> Private interest networks/communities/associations <u>Polity:</u> Market: Persuasion, learning, arguing, <u>Policy:</u> Soft law, flexible implementation, procedural regulation, incentives</p>
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Source: Derived from 'Self-regulation of Digital Media' (2004); Verhulst and Price (2005); NEWGOV (2004); Treib et al (2007)

- The EU as an 'actor' in international Internet governance institutions. In order to understand and explain the EU's 'actorness' and thus influence in the global telecommunications and Internet sectors (Christou and Simpson 2010a), we have utilised a broad analytical framework that draws on the literature on EU actorness (Bretherton and Vogler 2006; 2008) but also more specific work on the EU in international organizations (Jorgensen 2009) and the EU as a strategic actor (Smith and Xei 2009). The purpose of using such a framework is to unravel the context within which the EU is acting and more specifically, to investigate the opportunities that have enabled or constrained EU influence in the external environment of events, ideas and power; the capability of the EU to act (formulating and agreeing policy) in terms of the EU internal context and by virtue of its own identity, and finally; flowing from opportunity and capability, the EU's ability to influence and shape (or not) governance in relation to the Internet and more recently, telecommunications.

- The EU's mode of engagement (rational strategic/normative) in international Internet governance institutions. This has drawn from theories in IR which have sort to analyse actor behaviour in international institutions and more specific work that theorises on how the EU behaves in international regimes. Both, essentially, draw on the 'institutionalism' literature (rationalist and sociological). The following concepts have provided the basis for our analysis:

Strategic Mode - whereby the EU acts through a logic of consequences (bargaining mode and hard power). Such an approach is focused on enhancing actor information, reducing uncertainty and mediating preferences. Rules are then established through negotiation, which members are expected to adhere to, with 'the possibility of defection if the calculus shifts or if conditions in the broader global arena make this apparently profitable' (Smith and Elgstrøm, 2008: 6). Much work on principal-agent dynamics in international organizations has been underpinned by the rationalist logic, with a focus in particular on the control and cooperative aspects within this relationship; and especially the extent and conditions under which 'agents', such as the European Commission, can act as policy entrepreneurs.

Normative Mode – whereby the EU acts through a logic of appropriateness (problem-solving mode and soft power. This approach takes the focus away from the simple projection of preferences by actors and how such preferences can be secured through rational calculus, to ask questions of 'the terms on which actors enter into regimes, the ways in which they construct them or construct themselves within them, and the ways in which regimes may lose their strength because of an erosion of underlying principles such as trust, legitimacy and shared expectations among their members (Smith and Elgstrøm, 2008: 10). Also significant is the transformative effect of institutions – again neglected by rationalist approaches with a focus on institutions as management or regulatory devices and where preferences remain fixed. Here, much work has focused on how actors can use international fora and other arenas to

advocate, legitimise and diffuse alternative norms through communicative rather than coercive action (Keck and Sikkink 1998).

Rhetorical Action – the instrumental use of argument to persuade others of one's claims. Rhetorical action, therefore, involves a process of rationally driven norm manipulation. Very importantly, those actors with preferences which are in line with, but not identical to, institutional norms have a chance to 'add cheap legitimacy to their position' (Schimmelfennig, 2001: 63).

- The role of the EU (leader/mediator-adjudicator/broker) in international Internet governance institutions. A leadership role can be defined as the ability of an actor to shape and direct others towards its desired goal over a period of time (Underdal 1994: 178). Important in terms of leadership traits is the leader's vision and ability to persuade others (followers) of that vision in the appropriate institutional context. This latter point is significant as the role the EU plays, as already stated, is contextually determined with actors 'behaving in the way they think is appropriate in the particular context at hand' (Smith and Elgström 2008: 17). The EU can also play the role of mediator or bridge-builder in international fora, the main traits of which are an ability to build trust and consensus in order to arrive at solutions that cannot be found if other actors are left to their own devices. In this sense, the EU does not necessarily have to be a leader to be effective; it can also be successful as an actor that can offer alternatives on which others can compromise (Smith and Elgström 2008: 18-19; Elgström 2003, 2006, 2007).
- The impact of international organisations on the EU in terms of policy implementation and norm diffusion. The work on *policy implementation* focuses on how IO's can enforce rules, legislation and codes through:
 - a) Coercive means such as monitoring and sanctions

b) A managerial perspective, which essentially stresses problem solving and capacity building, rule interpretation and transparency. The dominant mode here 'is that of actors engaged in a cooperative venture, in which performance that seems for some reason unsatisfactory represents a problem to be solved by mutual consultation and analysis, rather than an offence to be punished' (Chayes and Chayes, 1995: 303; 1993)

c) Normative means – here, the authority of IOs is a vital resource. Power is, thus, not a matter of material but rather of intersubjective factors. The authority of IOs flows from the control over information and expertise (Barnett and Finnemore, 1999: 708) but also because of the fact that IOs are perceived as rational, neutral and impartial (see also Boli, 1999). The perception that IOs are rational and impartial actors can in part be attributed to the laws, rules, procedures that form the basis of their existence but is also reinforced by IOs themselves who 'present themselves as impersonal, technocratic, and neutral – as not exercising power but instead of serving others' (Barnett and Finnemore, 1999: 708).

The work on the influence of international institutions utilises conceptual work (see Jørgensen and Costa, 2010) on mechanisms of influence and facilitating conditions, as well as measuring impact, the latter of which draws heavily from the well-established Europeanization literature which posits four main types of impact: inertia (lack of influence by the international institution), absorption (some influence of the international institution on the EU, but only up to the point of adaptation), transformation (indicates a deeper influence of international institutions on the EU, both in terms of policies, policy making, behavior and institutions) and retrenchment (is a situation in which the EU reacts against a particular international institution, at least for some time) (Radaelli, 2002: 116).

LOCATIONS, PERFORMANCE AND EXPLANATION

Early International Institutionalisation of Internet Governance – Establishing the EU's Presence From a 'Standing Start'

The growth of the Internet until the mid to late 1990s took place, for the most part, under the EU's international 'policy radar'. A number of reasons lie behind this. First, and most obviously, the Internet emerged outside the EU. Whilst there is strong evidence that the EU was monitoring carefully developments in US audiovisual and telecommunications policy, not least the global ambitions of both, the development of the Internet was arguably viewed with passing, rather than strategic, interest (European Commission 1994). This quickly changed by the late 1990s, by which time negotiations on what eventually came to be known as ICANN were in full swing. Second, the EU's technological perspective on future electronic communications networks was articulated in projects around so-called Integrated Broadband Communications, whose protocols were different from those that underpinned the Internet's functionality (Lieb 2002). Thirdly, the EU had concentrated a considerable degree of policy energy through the 1980s and early 1990s on its own internal internationalisation project in electronic network communications, focused on broadcasting (see Harcourt 2005; Humphreys 1996) and, in particular, telecommunications (see Thatcher 2001; Goodman 2006). The 'Eu-isation' of both these areas was a far from uncontroversial project which highlighted many of the core issues at the heart of the wider European integration project.

In the process leading to the creation of ICANN, the EU was, therefore, something of an outsider. An illustration of this was the rejection, by the US government, of the International Ad-Hoc Committee's proposal for a global Internet addressing body to be headquartered in Switzerland, largely due to the presence of the International Telecommunication Union. The proposed IAHC arrangement would arguably have presented the EU with a considerably less challenging institutional environment than the one that eventually transpired. Here, in the subsequent negotiations that led to the US headquartered ICANN, the EU, despite significant lobbying efforts, played a minor role compared to the US government and US-based Internet technical interests (see Mueller 2002). Two exceptions to this were the creation of a Governmental Advisory Committee (GAC) to ICANN and a Uniform Dispute Resolution Procedure (the latter drawing on the practice of the World Intellectual Property Organization), both of which the EU was in favour. Once established, however, the EU made strong efforts to create a prominent

presence and position of influence for itself in ICANN. These efforts proved to a considerable degree successful. The EU drew on its growing international policy reputation in electronic communications, producing a landmark statement on Internet governance which declared dissatisfaction, *inter alia*, with the perceived dominance of US interests in ICANN and urging close monitoring of the private interest governance of the Corporation that was taking shape operationally (European Council of Ministers 2000). However, rather than reject ICANN, the EU took significant pains to engage with it. In this process, there is evidence that the EU employed rhetorical action to manipulate key ICANN norms for its own strategic benefit (Christou and Simpson 2007).

First, in respect of ICANN's self-regulatory *modus-operandi* accompanied with an advisory-only presence for states exercised through the GAC, the EU argued for a shift in the direction of co-regulation. It is important to stress that, by this, the EU did not wish to replace self-regulation by joint state Internet regulation at the global level. Rather, it wished to see a techno-functional system in place, whose fundamental public policy parameters were guarded and guided by joint state action through a more influential, though still relatively light touch, GAC. As the first decade of ICANN proceeded, this has indeed transpired, though for more prosaic reasons than the arguments and suasion of the EU. Most clearly, the realisation among ICANN's technical elite of the public policy and political ramifications of the Corporation's work and the political complexity arising thereby explains the change.

Second, at a much more functional level, at the inception of ICANN, the EU moved quickly to secure for itself a legitimate presence on the GAC through putting forward a proposal to create its own Internet Top Level Domain, dot eu. Through this action, the EU aimed to manipulate, though not radically, the existing naming system norm of ICANN where domains were either 'generic' (related, broadly speaking to organisational entities and activities of various kinds) or 'country code' (based on single nation state identities). Through securing strong support from its own 'domestic' business community, and complying, for the most part, with the governance *modus operandi* of TLDs prescribed by ICANN, the EU was able to secure dot eu as the first

‘internationalised’ country code TLD. As a consequence, the European Commission obtained a ‘legitimate’ presence on the ICANN’s GAC, creating something of a ‘policy bridgehead’ to try to influence the evolution of the Corporation thereafter (see Christou and Simpson 2006).

The EU as a Coherent Policy Actor in the Internet’s International Institutional Landscape

The EU’s considerable policy activity in the Internet’s international institutional landscape has, its achievements aside, also shown up the distinct difficulty which it has faced in securing and presenting a coherent policy position on Internet governance matters. The EU’s intra-institutional mechanics provide the route to understanding the problem (Christou and Simpson 2010a). At Council of Ministers level an important early landmark was the establishment of the Internet Informal Group (IIG), influenced to a considerable degree by the European Commission’s then Information Society Directorate-General. The IIG contains Member State GAC members and is chaired by the Commission. Importantly, it serves as a discussion and information sharing forum only. More formally, the EU created the High Level Group on Internet Governance (HLGIG) to develop strategic policy positions among Member States. However, it is important to note that the HLGIG is under no formal procedural requirement to coordinate Member State positions. In practice, the HLGIG has acted in instances where it considers it important that the EU aims to put forward a single coherent position. Key policy examples here have been in respect of the creation of the Joint Project Agreement (JPA) in 2005 between the US government and ICANN and the 2010 review of the Internet Governance Forum (IGF) (authors’ interview 2010). This lack of legal remit has created both internal coordination and external perception problems for the EU. The HLGIG has ‘always been wary of the Commission driving the Internet agenda’ (authors’ interview, 2010). For EU negotiating partners and observers, there has frequently been difficulty in establishing precisely what the official EU position is on a particular Internet policy matter. A further complication arises from the intervention of the EU Presidency, which has articulated the official EU position at key junctures, such as at the 2005 World Summit on the Information Society and in respect of the recently agreed Affirmation of

Commitments between the US government and ICANN, effectively replacing the aforementioned JPA. The EU's lack of coherence has also meant that there is no formal EU representative on ICANN's GAC. Interestingly, the European Commission sits on the GAC in respect of its responsibilities related to the governance of dot eu only (authors' interview 2010). The GAC also contains representation from individual EU Member States, creating further scope for the articulation of divergent opinions, unlikely to serve the interests of presenting a united EU front to institutional counterparts.

Impact of the Internet's International Institutional Landscape on the EU

A key aspect of the EU's engagement with the international institutional landscape of the Internet concerns the degree of impact which has occurred on the development of the EU's own perspective on the Internet. Very much an under-researched area of EU Internet policy, a significant finding has been that the degree of impact of an institution and its policies developed at the global level tends to be in part a function of the degree to which the EU has been able to assert itself in the policy context in question: impact is thus a dialectical process (Christou and Simpson 2010b). The European Commission has also been a key entity in any processes of policy absorption that the EU has been involved in. On the one hand, it has been able to act as an amplifier of international Internet policy agendas 'domestically'. Through its work in proposing new policy positions and in producing regular assessments of the development of the Internet governance landscape the Commission has functioned as a promoter and an 'educator', internally and externally. On the other hand, the Commission has played a key role as a policy filtration agent, in the process allowing the EU to adapt, where it felt necessary, global policy agendas to the idiosyncrasies of its own domestic governance system. This is clearly illustrated in the case of the dot eu TLD, whose system of governance, as noted above, bears the key hallmarks of ICANN's not-for-profit, private interest self-regulation but is also framed by a set of public policy rules the guardianship of which lies with the Commission acting in the public interest (Christou and Simpson 2006).

Two further relatively prominent examples illustrate the significant impact of the international institutional landscape of the Internet on the EU. First, as noted above, once

particularly wary of the *modus operandi* of the GAC in respect of its relationship with the ICANN Board, evidence suggests the EU is now much more comfortable with the idea that ICANN undertakes the day-today running of the Internet and the GAC gives policy advice to it when appropriate. This has no doubt been helped by the fact that ICANN is much more willing to defer to the GAC's position on Internet governance matters with a strong public policy dimension (Kleinwachter 2008). This notwithstanding, there is also some evidence of an ongoing difference of opinion between the European Commission and the HLGIG on the matter (European Commission 2009 and authors' interviews 2009; 2010), the Commission being much more critical of the GAC.

Second, there is considerable evidence that the multi-stakeholder model of the IGF has been accepted, and to a significant degree adopted domestically, by the EU. It is important to note that multi-stakeholderism does not have any real policy roots in the EU political landscape. Yet, the HLGIG, in its 2009 *Hearing on the Future of Internet Governance*, expressed support for the continuation of the IGF, after the 2010 review of the latter. The European Parliament has called for the creation of a European IGF. Though the latter has not as yet been created, there is some evidence of institutional mimicry of the IGF within the EU. The European Dialogue on Internet Governance (EuroDIG) is a multi-stakeholder platform for the discussion of Internet governance matters. At national level, France, Germany and the UK have established national level IGFs.

CONCLUSIONS AND FUTURE DIRECTIONS

Work on the EU and Internet governance is in its infancy, with much remaining unexplored both in terms of the internal policy making and the EU's subsequent performance in the relatively young international institutions that 'govern' the Internet. The evidence thus far suggests that whilst the EU has certainly, through its projections and communications on Internet governance, declared itself a leader, its *performance* has pointed to real constraints in fulfilling such a role.

The EU was not able to develop any kind of coherent position on the Internet before it became a high profile global communications policy matter. However, the EU, through the European Commission in particular in the early period of intervention, proved enthusiastic and relatively adept at exploiting policy opportunities which arose. However, unlike in telecommunications, uncertainty married to the perceived need to react to policy developments which were viewed with some degree of concern, left the EU and its Member States 'on the back foot'.

Since the late 1990s, the EU has aimed to articulate and establish its interests in relevant global institutional contexts from a position of relative weakness, certainly compared to that experienced in the telecommunications sector. The result has inevitably been one of partial success. A major constraint has been the relative power differential and key policy differences experienced viz-a-viz the US. There are, however, signs that the two parties, in particular with the new Obama administration, are much more aligned in their preferences for future Internet governance than in the past. The EU has gained policy ground, assisted by significant uncertainty and some turbulence in the development of global Internet policy agendas, which has involved contestation of ICANN, in particular and, lately, the IGF.

The EU has, however, struggled in the past to project a clear, cogent message on Internet governance given the informal nature of its internal policy process for constructing positions on Internet governance, and the opportunities this afforded those in the Commission with their own political agenda to influence global proceedings. The result was often multiple messages, multiple EU representatives in different global fora and confusion over what the 'real' EU position was. This did not imbue the EU with the visibility or credibility required to be as influential as it could in many instances. More recently, with a change of Commissioner that seems to have taken a less assertive role (indeed she has been more interested in telecommunications, but this is perhaps natural given her previous competition policy background), and agreement on the Lisbon Treaty, there has evolved an internal mechanism that is resulting in more consensual policy-making and the projection of coherent EU positions in matters of crucial importance for the future of Internet governance (the IGF and the AoC). However, given the lack of

legal mandate underpinning the policy process, this does not preclude individuals and institutions from projecting their own autonomous positions in the future without reference to the informal mechanism established through the HLGIG. Moreover, the lack of formal EU representation will also be problematic if the EU has the ambition to be taken seriously as a ‘leader’ and coherent actor in Internet governance, beyond its own self-projections. Addressing these two issues would certainly alleviate the problem of identifying first, the ‘official’ EU position (and the process through which it is constructed), and second, who speaks and negotiates for the EU on Internet governance.

In terms of future directions and future research in this area, then it is clear that there is still much to be done in order to enrich the existing work. For us, this includes:

- *The perceptions of others on the EU’s role, performance and influence (relevance). Who else considers the EU a leader within the international Internet milieu in which it operates?

- *‘Informal governance’ and how this impacts on the EU construction and projection/negotiation of positions in global internet institutions. To what extent does this help or hinder the EU’s performance and leadership ambitions in different contexts? Will the Lisbon Treaty make any difference to which EU actor will represent and negotiate for the EU in this area?

- *Problematizing negotiation and diplomacy. How can we move beyond ‘modes’ to specific tactics and strategies employed by EU actors in deliberations and negotiations?

- *Policy learning/transfer and institutional mimicry, in particular with regard to the impact of governance concepts such as ‘multi-stakeholderism’ but also policy ideas from international Internet organisations such as the IGF and ICANN, especially on key issues such as cyber security.

- *Comparative ‘communications’ analysis. What can we learn across the EU communications sector about international performance and interaction? What can we learn through comparing the EU approach to other major actors’ such as the US?

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